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Materials for

CITIZENSHIP THEORY AND IMMIGRATION LAW (262Y)

1999 / 2000

VOLUME 3

Professor Ayelet Shachar
Faculty of Law
University of Toronto

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CITIZENSHIP THEORY & IMMIGRATION LAW (262Y)

Professor Ayelet Shachar
Fall 1999 and Spring 2000
Four credits: two hours
Class: Thursday 2:10 – 4:00
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The course will consider selected key policy issues of Canadian immigration law in the context of major political, economic and technological developments in the last quarter of the century. These developments pose challenges to traditional understandings of state sovereignty and hence, to traditional understandings of citizenship. Through a critical examination of the *jus soli* and *jus sanguinis* principles, we will address the two following issues: first, who are and who are not but should be state citizens; second, what are and should be the effects of citizenship status upon individuals' entitlements to civic, political, economic and social rights. In examining these issues, we will consider the general principles, conditions and terms under which persons may be admitted to membership in a polity, along with the specific admissible membership categories established by the *Immigration Act*. Special attention will be given to the objective of reuniting families, the refugee class, and the promotion of Canada's economic, social and demographic goals as cornerstones of Canadian immigration policy. We will also explore the recent wave of changes in Canadian, American, and Western European countries' immigration laws in light of the increasing intermingling of people, skills, and cultural identities across borderlines. In this context, we will discuss two apparently contradictory trends: the solidification of supranational regimes such as NAFTA and the EU, on the one hand, and the rise of "localism" and claims for regional or cultural autonomy, on the other. We will analyze the effect of these two trends on contemporary attempts by theorists and legislators alike to rethink the concept of citizenship and re-examine long-standing propositions in immigration law.

Evaluation:

- Class participation (10%): Class meetings will be organized around a discussion of a given week's reading. Class participation includes attendance, substantive participation in weekly discussions, and two in-class presentations of your comment papers (see below).
- Two four-page comment papers (20%): The comment papers will be short critical essays integrating the sources on the reading list for that class. Comment papers are due at 4 p.m. on the day before the readings is scheduled to be discussed. Each student is expected to use the four-page comment paper to illuminate an important question in the reading or to develop their own coherent argument based on the readings. Students must sign up for the oral presentations of their comment papers ahead of time, during the second meeting of the seminar.

- A final (approx. 20-25 page) research paper (70%): The final paper's topic must be pre-approved by the instructor. The final paper is due by 10 a.m., Friday, April 28;

Required Texts:

A course packet is available for purchase at the University of Toronto Faculty of Law Bookstore.

I. CITIZENSHIP THEORY

1) Introduction

Objectives and design of the course.

Course requirements.

The Economist, "Borders" pp. 19-22, December 19, 1998.

2) Borders and Social Closure

Mavis Baker v. Canada (Minister of Citizenship and Immigration), File No 25823, Decisin given on July 9, 1999.

W. Rogers Brubaker, "Citizenship as Social Closure" in *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press, 1992), chap. 1.

T. Alexander Aleinikoff, "The Tightening Circle of Membership" Vol. 22 *Hastings Constitutional Law Quarterly* 915 (1995).

3) Open Borders and the Liberal State

Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, CT: Yale University Press. 1980), pp. 93-95.

Micahel Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), chap. 2.

Joseph H. Carens, "Aliens and Citizen: The Case for Open Borders" Vol. 49 *Review of Politics* 251 (1987).

* Catherine Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law" Vol. 10 *Canadian Journal of Law and Jurisprudence* 323 (1997).

II. INTERNATIONAL MIGRATION

4) International Migration Trends; National Immigration Control Regimes

Wayne A. Cornelius et al., "The Ambivalent Quest for Immigration Control" in *Controlling Immigration* eds. Wayne A. Cornelius et. al. (Stanford: Stanford University Press, 1992) pp. 3-41, 415-421.

Alejandro Portes and Jozsef Borocz, "Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation" Vol. 23 *International Migration Review* 606 (1989).

Timothy King, "Immigration From Developing Countries: Some Philosophical Issues" Vol. 93 *Ethics* 525 (1983).

5) Globalization, Territoriality, and Sovereignty

Saskia Sassen, "Immigration Tests the New Order" in *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996) chap. 3.

Peter Andreas, "The Escalation of U.S. Immigration Control in the Post-NAFTA Era" Vol. 113 Po*litical Science Quarterly* 591 (1998-1999).

* Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997), pp. 1-28, 69-85.

6) Domestic Politics and Immigration Law

Louis Michael Seidman, "Fear and Loathing at the Border" in *Justice in Immigration*, pp. 136-146.

Christian Joppke, "Why Liberal States Accept Unwanted Immigration" Vol. 50 *World Politics* 266 (1998).

* Gary Freeman, "The Decline of Sovereignty? Politics and Immigration Restriction in Liberal States" in *Challenge to the Nation-State* ed. Christian Joppke (Oxford: Oxford University Press, 1998), chap. 3.

7) The Welfare Economics of Immigration

Alan O. Sykes, "The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of US Policy" in *Justice in Immigration* ed. Warren F. Schwartz (Cambridge: Cambridge University Press, 1995), pp. 158-183,193-200.

Gillian K. Hadfield, "Just Borders: Normative Economics and Immigration Law" in *Justice in Immigration*, pp. 201-211, 212-218.

III. MEMBERSHIP MODELS

8) Birthright Citizenship: *Jus Soli* and *Jus Sanguinis*

Christopher L. Eisgruber, "Birthright Citizenship and the Constitution" Vol. 72 *New York University Law Review* 54 (1997).

Report of the Standing Committee on Citizenship and Immigration, *Canadian Citizenship: A Sense of Belonging* (Ottawa: Canada Communication Group 1994), pp. 17-21.

9) Gender Discrimination and *Jus Sanguinis*

Benner v. Canada (Secretary of State) [1997] S.C.J. No. 26.

Committee on Feminism and International Law, International Law Association, *Women's Equality and Nationality in International Law* (Taipai: Preliminary Report, May 1998).

* Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weidenfeld and Nicolson, 1990) pp. 81-91.

10) Consensual Citizenship

Peter H. Shuck and Rogers M. Smith, "Consensual Citizenship" *Chronicles* 21 (July 1992).

Gerald L. Newman, "Back to *Dred Scott*" Vol. 24 *San Diego Law Review* 485 (1987).

11) Ethnocultural Citizenship

Kay Hailbronner, "Citizenship and Nationhood in Germany" in *Immigration and the Politics of Citizenship in Europe and North America* ed. W. Rogers Brubaker (Lanham, MD: University Press of America, 1989), chap. 3.

Germany Information Center, "Citizenship Reform and Germany's Foreign Residents" <http://www.germany-info.org/content/np_3c.html>

* Ayelet Shachar, "Whose Republic: Citizenship and Membership in the Israeli Polity" Vol. 13 *Georgetown Immigration Law Journal* 233 (1999).

12) Supra-national Citizenship

Rainer Baubock, "Citizenship and National Identities in the European Union" *Harvard Jean Monnet Working Paper* 4/97.

J.H.H. Weiler, "The Selling of Europe: The Discourse of European Citizenship" *Harvard Jean Monnet Working Paper 3/96.*

* Rey Koslowski, "European Union Migration Regimes: Established and Emergent" in *Challenge to the Nation-State*, chap. 5.

IV. CANADIAN IMMIGRATION POLICY

13) Historical Background: A Critical Evaluation of the Evolution of Canadian Immigration Law

Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998), chap. 1, pp. 352-381.

Lisa Maire Jakubowski, "Bill C-86: Managing Immigration in the '90s" in *Immigration and the Legalization of Racism* (Halifax: Fernwood Publishing, 1997), pp. 63-90.

* Bruce Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbian Anti-Asian Immigration Legislation, 1884-1909" Vol. 29 *Osgoode Hall Law Journal* 619 (1991).

* Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe, 1933-1948* (3rd ed., Toronto: Lester Publishing, 1991).

14) The American Historical Experience: Race and Gender-Based Immigration Restrictions

Ian F. Haney Lopez, *White By Law: The Legal Construction of Race* (New York: New York University Press, 1996) pp. 37-46.

Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997) pp. 13-39.

* Virginia Sapiro, "Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States" Vol. 30 *Politics and Society* 1 (1984).

15) Jurisdictional Boundaries; Source of Federal and Provincial Powers over Immigration to Canada

Section 91 (25) *The Constitution Act,* 1867: Naturalization and Aliens.

Section 95 *The Constitution Act,* 1867: Concurrent Powers over Immigration.

The Immigration Act, 1976.

The Immigration Regulations.

The Annual Immigration Plan.

16) Federal-Provincial Agreements on Immigration Regulation: The Case of Quebec

Scott A. Hanna, "Shared Powers: The Effects of Shared Canadian Federal and Quebec Provincial Immigration Powers on Immigrants" Vol. 9 *Georgetown Immigration Law Journal* 75 (1995).

Joseph H. Carens, "Immigration, Political Community, and the Transformation of Identity: Quebec's Immigration Policy in Critical Perspective" in *Is Quebec Nationalism Just?* Ed. Joseph H. Carens (Montreal & Kingston: McGill-Queen's University Press, 1995), pp. 20-38, 73-74.

* Joseph Garcea, "The Immigration Clause in the Meech Lake Accord" Vol. 21 *Manitoba Law Journal* 274 (1992).

17) The American Immigration Experience: Federal Supremacy

T. Alexander Aleinikoff, "Citizens, Aliens, Membership and the Constitution" Vol. 7 *Constitutional Commentary* 9 (1990).

Karl Manheim, "State Immigration Laws and Federal Supremacy" Vol. 22 *Hastings Constitutional Law Quarterly* 939 (1995).

V. ADMISSION TO CANADA; IMMIGRANT CATEGORIES

18) Overseas Applicants; General Requirements

Manuel Gracia y Griego, "Canada: Flexibility and Control in Immigration and Refugee Policy" in *Controlling Immigration*, pp. 119-140

Gerald E. Dirks, *Controversy and Complexity: Canadian Immigration Policy during the 1980s* (Montreal & Kingston: McGill-Queen's University Press, 1995) pp. 3-44

19) "member of the family class"

A. Defining "family" and "spouse"

Philip L. Bryden, "Fundamental Justice and Family Class Immigration: The Example of Pangli v. Minister of Employment and Immigration" Vol. 41 *University of Toronto Law Journal* 484 (1991).

McIntosh, "Defining 'Family' – A Comment on the Family Reunification Provisions in the Immigration Act" Vol. 3 *Journal of Law and Social Policy* 104 (1988).

Legislative Review Advisory Group, "Executive Summary", *Not Just Numbers: A Canadian Framework for Future Immigration* (1998) p. 3.

* The American perspective: *Adam v. Howerton*, United States Court of Appeals, Ninth Circuit, 1982, 673 F. 2d 1036 (cert. Denied, 458 U.S 1111).

B. Marriage of convenience

Horbas v. Canada (Minister of Employment & Immigration), [1985] 2 F.C. 359 (T.D.).

The American perspective: *The Immigration Marriage Fraud Amendments of 1986.*

C. Domestic violence

Michelle Anderson, "A License to Abuse: The Impact of Conditional Status on Female Immigrants" Vol. 102 *Yale Law Journal* 1401 (1993).

Linda Kelly, "Domestic Violence Survivors: Surviving the Beatings of 1996" Vol. 11 *Georgetown Immigration Law Journal* 303 (1997).

20) Independent Immigrant Class; The Business Immigration Program

Donald Galloway, *Immigration Law*, pp. 155-170.

Anne Dobson-Mack, "Independent Immigrant Selection Criteria and Equality Rights: Discretion, Discrimination and Due Process" Vol. 34 *Cahiers de Droit* 549 (1993).

21) The Live-In Caregiver Program

Audrey Macklin, "Foreign Domestic Workers: Surrogate Housewife or Mail Order Servant?" Vol. 37 *McGill Law Review* 681, 682-734 (1992).

Lisa Marie Jakubowski, *Immigration and the Legalization of Racism*, pp. 46-62.

22) Convention Refugees Seeking Resettlement and Designated Classes

Singh v. Canada (Minister of Employment & Immigration), [1985] 1 S.C.R. 177.

Dennis McNamara, "The Protection of Refugees and the Responsibility of States: Engagement or Abdication?" Vol. 11 Harvard Human Rights Journal 355 (1998).

Howard Adelman, "Canadian Refugee Policy in the Postwar Period: An Analysis" in *Refugee Policy: Canada and the United States*, ed. Howard Adelman (Toronto: York University, 1991).

* Gerald E. Dirks, "Canada's Refugee Policy: A Conundrum" in *Controversy and Complexity*, pp. 60-96.

23) Female Migrants and Refugees

Ward v. Canada (1993), 20 IMM. L. R. (2d) 85 (S.C.C.).

Heather Potter, "Gender-Based Persecution: A Challenge to Canadian Refugee Determination System" Vol. 3 *Dalhousie Journal of Legal Studies* 81 (1994).

Audrey Macklin, "Refugee Women and the Imperative of Categories" Vol. 17 *Human Rights Quarterly* 213 (1995).

* Mattie L. Stevens, "Recognizing Gender-Specific Persecution: A Proposal to add Gender as a Sixth Refugee Category" Vol. 3 *Cornell Journal of Law and Public Policy* 179 (1993).

24) Naturalization

Re Leung [1996] F.C.J. No. 1040 (T.D.) (QL)

W. Rogers Brubaker, "Citizenship and Naturalization: Policies and Politics" in *Immigration and the Politics of Citizenship in Europe and North America*, chap. 5.

Report of the Standing Committee on Citizenship and Immigration, *Canadian Citizenship: A Sense of Belonging*, pp. 4-13.

25) Removal and Deportation

Chiarelli v. Canada (Minister of Employment & Immigration), [1992] 1 S.C.R. 711.

Gomez v. Canada (Minister of Citizenship and Immigration), [1998] I.A.D.D. No. 1329 No. V97-01833.

Russel P. Cohen, "Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada" Vol. 32 *Osgoode Hall Law Journal* 457 (1994).

VI. THE CITIZENSHIP DEBATE REVISITED

26) Borders, Immigration, and Social Justice

Yasmin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago, 1994) pp. 1-44, 119-167.

Owen Fiss, *A Community of Equals*: *The Constitutional Protection of New Americans* (Boston: Beacon Press, 1999), pp. 3-21.

* Jules L. Coleman and Sarah K. Harding, " Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders" in *Justice in Immigration*, pp. 18-62.